

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL NO. 1:06-CR-0138
	:	
v.	:	(Judge Conner)
	:	
ROBERT RAYMOND HOWARD, SR.,	:	

ORDER

AND NOW, this 15th day of January, 2008, upon consideration of defendant's motion (Doc. 89) to vacate the sentence imposed by this court on December 14, 2007, see 28 U.S.C. § 2255 ("A prisoner in custody under sentence of a [federal] court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."), and defendant's motions for an evidentiary hearing (Doc. 91) and for appointment of counsel for his § 2255 motion (Doc. 90), and it appearing that the above-captioned action is currently on direct appeal to the United States Court of Appeals for the Third Circuit,¹ see Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999) ("[A] collateral attack [under § 2255] is generally inappropriate if the possibility of further direct review remains open: A district court should not entertain a habeas corpus petition while there is an appeal pending in [the court of appeals] or in the Supreme Court."); see also United States v. Ford, 215 F. App'x 167, 168 (3d Cir. 2007) (affirming the district court's dismissal of a § 2255 motion as premature while the

¹ Defendant filed a notice of appeal on December 27, 2007. (See Doc. 87.)

defendant's direct appeal was pending); Kline v. United States, No. 04CR269, 2006 WL 680842 (M.D. Pa. Mar. 14, 2006), and the court finding that no "extraordinary circumstances" warrant consideration of the instant motion while defendant's direct appeal is pending, see id. ("While a direct appeal is pending, a District Court may consider a § 2255 motion only in 'extraordinary circumstances.'"), it is hereby ORDERED that:

1. The motion to vacate (Doc. 89) is DISMISSED as premature without prejudice to defendant's right to file a timely² § 2255 motion after his conviction has become final following appeal. If defendant is unsuccessful on direct appeal and then files a new, timely § 2255 motion, that motion will *not* be considered a second or successive § 2255 motion.
2. The motions (Docs. 90, 91) for appointment of counsel for his § 2255 motion and for an evidentiary hearing are DENIED as moot.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

² See 28 U.S.C. § 2255 ("A 1-year period of limitation shall apply to a motion under this section."); United States v. Davies, 394 F.3d 182, 186 n.2 (3d Cir. 2005) (stating that, where the defendant has taken a direct appeal, the § 2255 limitations period begins to run "on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires" (citing Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999)))